Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 200

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., LONG ISLAND LIGHTING COMPANY, and NIAGARA MOHAWK CORPORATION

PETITIONERS

V.

JOHN D. ASHCROFT, Attorney General of the United States, and RUTH HARVEY, Attorney, Civil Division, Department of Justice

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Attorney General is recovering funds pursuant to a judgment in favor of the United States but committed to distribution to designated beneficiaries, and the Attorney General seeks a fee from such funds, is it a denial of constitutionally protected procedural due process for the beneficiaries to be precluded from opposing such a fee as parties?

2. When the Attorney General is awarded such a fee, from funds which would otherwise be awarded the beneficiaries, in a judicial proceeding in which the Attorney General has successfully excluded the beneficiaries as parties, is mandamus available to require the return of the fees to the extent unauthorized by law?

3. Where the sole justification for the award of a fee to the Attorney General is the Federal Debt Collection Procedures Act ("FDCPA"), is that Act improperly employed to impose a fee obligation on the designated judgment beneficiaries rather than on the judgment debtor?

4. If the FDCPA is so available in a proceeding in which no provision is made for participation by the Judgment Beneficiaries, is it unconstitutional in denying those to be deprived of property the right to defend their property interest?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption of the case contains the names of all of the parties.

Consolidated Edison Company of New York Inc. is a wholly owned subsidiary of a publicly owned corporation, Consolidated Edison Inc.; Long Island Lighting Company is a wholly owned subsidiary of Long Island Power Authority, a corporate municipal instrumentality of the State of New York. Niagara Mohawk Power Corporation is a wholly owned subsidiary of a publicly owned corporation, Niagara Mohawk Holding, Inc.

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CITATION OF REPORTS OF OPINIONS

The decision of the Court of Appeals for the District of Columbia Circuit as to which this petition for certiorari is filed is reported as Consolidated Edison Co. v. Ashcroft, 286 F. 3d 600 (D.C. Cir., 2002), The denials of the Petition for Panel Rehearing and for Rehearing en Banc are not reported officially. They are reported unofficially at 2002 US App. Lexis 13,051 and 13,047.

The District Court Decision was rendered by a bench opinion and an Order of Dismissal. It is not reported officially.

JURISDICTION

The Judgment sought to be reviewed was entered April 23, 2002.

Timely filed Petitions for Panel Rehearing and For Rehearing En Banc were denied by Order entered June 21, 2002.

Jurisdiction of the Supreme Court is pursuant to 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the

Constitution of the United States provides, in relevant part:

> No person shall... be deprived of...property, without due process of law."

28 U.S.C. Section 1361 provides:

> The district courts shall have original jurisdiction to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. Section 3011 provides, in relevant part:

> (a) Surcharge authorized.- In an action or proceeding under Subchapter B or C, and subject to subsection (b), the United States is entitled to recover a surcharge of 10% of the amount of the debt in connection with the recovery of the debt, to cover the cost of processing and handling the litigation and enforcement under this chapter of the claim for such debt.

STATEMENT OF THE CASE

Plaintiffs, three electric utilities ("Utilities") brought this action in the District Court for the District of Columbia to compel the Attorney General of

the United States to return to his nominal client, the Secretary of Energy ("DOE") of the United States, some $800,000 in fees which had been obtained by the Attorney General by order of the District Court for the Southern District of Alabama.

Should such fees be returned, they would be distributed by DOE to some 37 individuals or companies. The Utilities are three of those companies and brought this action on behalf of all 37; the Utilities would cumulatively receive some 73% or almost $600,000 of the returned fees.

Jurisdiction of the District Court was pursuant to 28 U.S.C. Sections 1331 and 1361 and Section 211 (a) of the Economic Stabilization Act Amendments of 1971 ("ESA"), Pub. L. 92-210, 85 Stat. 743 (1971).

The Attorney General had sought, and been awarded, the $800,000 fee by the District Court for the Southern District of Alabama pursuant to a formula set forth in the Federal Debt Collection Procedure Act ("FDCPA"), 28 U.S.C. 3011, following that Court's rejection of a claim for $185,000 in fees based upon time and expenses incurred.

Utilities had sought, and had been denied, intervention to oppose the initial fee request, and sought and were denied

intervention to challenge the award of fees pursuant to the FDCPA (Appendix, p. 31a, 39a). They had been permitted to oppose the initial fee request and the award pursuant to the FDCPA as amicus curiae, but as such were neither permitted to offer oral argument in the District Court nor to appeal the FDCPA fee award.

Utilities appealed to the Court of Appeals for the Eleventh Circuit the twin denials of intervention, seeking to have that Court grant intervention and determine the merits of their challenge to the FDCPA award. The Eleventh Circuit, per curiam, affirmed the denial of the twin requests for intervention, and did not address the merits of the Utilities' contention i.e. that the FDCPA was inapplicable in the circumstances and provided no basis for the fee award (Appendix p. 41a-45a).

Upon the denial of relief by the Eleventh Circuit, Utilities filed the instant mandamus action in the District of Columbia; the DOE moved to dismiss, and Utilities moved for summary judgment. Judge Paul Friedman of the District Court rendered a bench opinion at oral argument and issued an Order of Dismissal (Appendix p. 14a-30a). An appeal was taken to the Court of Appeals for the District of Columbia Circuit which affirmed the

District Court's dismissal, holding that mandamus was not available (Appendix, p. 1a-13a).

The relevant history as averred in Utilities' Complaint in the District of Columbia is as follows:

The Underlying Enforcement Action, and the Establishment of the Utilities' Rights

In 1988, the United States obtained a judgment against corporate defendants Citronelle Mobile Gathering Inc. and Citmoco Services Inc. (collectively, "Citronelle") and an individual defendant Bart B. Chamberlain ("Chamberlain") on the allegation that they had violated the regulations of the Department of Energy with regard to the pricing of crude oil. Chamberlain refused to disclose the location of his assets, was held in civil contempt of Court, and fled the country; he, and presumably a substantial portion of his assets remain unavailable to the Court.

As of April 1, 1992, the amount due on the judgment with interest to that date was $29,929,114.94. The Department of Energy, to which the Court had referred the matter for a recommendation with regard to disbursement of any amounts collected on the judgment, identified 37 purchasers of refined oil products who had purchased 56.62% of the refined oil

products affected by the overcharges, and recommended that 56.62% of the judgment and interest as of April 1, 1992, i.e. $15,748,700.28 be distributed pro rata to such 37 purchasers (the "Judgment Beneficiaries"), with all funds recovered to be used for such distribution until the total amount transferred to the Department of Energy for such purposes reached $15,748,700.28. The Attorney General so moved the Court and the Court so ordered in August 1992. The only use of first collected funds other than their award to the judgment beneficiaries provided for by the Court order was to compensate the receiver who had been appointed to recover the judgment.

To date, less than $13.4 million has been made available to the DOE and has been distributed to the 37 judgment beneficiaries. Additional amounts collected from the judgment debtors by the Receiver appointed by the District Court have been used (i) to pay various expenses incurred by the Receiver, and fees of the Receiver, and (ii) to pay the Department of Justice the $800,000 awarded it by the District Court.

No funds remain available to the District Court or to the DOE for distribution to the overcharged purchasers.

Thus, even if the $800,000 received by the Department of Justice was ordered to be transferred to the Department of Energy for distribution to the overcharged purchasers, the amount available for distribution to the 37 judgment beneficiaries would still total less than $14.5 million, or $1,250,000 less than the amount which the Court ordered be paid to them before any other distribution of recovered funds.

The $800,000 payment from recovered funds to the Department of Justice was made pursuant to an order of the District Court for the Southern District of Alabama, which in a "Final Amended Judgment" filed September 26, 1997, ordered, without explanation: "The United States is also awarded, pursuant to 28 U.S.C. Section 3011 (the Federal Debt Collection Procedures Act, "FDCPA"), an amount equal to ten percent of all amounts deposited with the Registry of the Court since May, 1991." (Appendix, p. 37a)

The Utilities' Intervention Effort, and the Attorney General's Opposition

Because the defendants in the enforcement action were no longer active in the litigation, the only party was the DOE represented by the Attorney General.

Prior to the application of the Attorney General for a fee, Utilities had

sought intervention on three occasions in connection with the sale of assets of the judgment debtors by the Receiver. On each occasion, their application for intervention was opposed by the Attorney General and on each occasion was denied. On appeal, the denial of intervention in all three cases was affirmed by the Eleventh Circuit without discussion in an unpublished order (Appendix, p. 41a-45a).

When the Attorney General sought a fee, Utilities again sought intervention and in the alternative amicus curiae status, for the purpose of opposing the award of a fee. The Attorney General opposed intervention and amicus status. The Court denied intervention but granted amicus status, albeit precluding the Utilities from offering oral argument. The Court rejected the application of the Attorney General for a fee in the amount of $185,000. When the Attorney General sought reconsideration or in the alternative a fee pursuant to the FDCPA, Utilities opposed such in their amicus status, and when the Court granted the application pursuant to the FDCPA, the Utilities sought intervention in order to seek reconsideration of the FDCPA award, and/or to appeal. The Attorney General opposed this fifth application for intervention, and it was denied.

(Appendix, p. 31a, 39a).

When the denial of the fourth and fifth applications for intervention was appealed by Utilities to the Eleventh Circuit, the Attorney General on behalf of DOE successfully argued for affirmance of such denials of intervention.

ARGUMENT

In the underlying proceedings in the District Court for the Southern District of Alabama, the Attorney General of the United States, in pursuit of a fee to be paid from funds due to Petitioner Utilities (pursuant to an Order which the Attorney General had obtained), successfully sought the denial by the District Court and the Court of Appeals for the Eleventh Circuit of the Petitioner Utilities' Fifth Amendment right to defend their property right to the $800,000 sought by (and ultimately awarded to) the Attorney General as a fee.

The mandamus here sought by Utilities to require the Attorney General to disgorge the $800,000 is an appropriate remedy to rectify the due process denial, and is the only remedy available for such purpose. Moreover, it is particularly appropriate because the Attorney General effectively represented to the Court that

she would not seek a fee from the funds due Utilities and their fellow judgment beneficiaries.

The award of the $800,000 fee by the Southern District of Alabama was ordered pursuant to the Federal Debt Collection Procedures Act ("FDCPA), but that Act does not provide for a fee to be paid from funds due to the beneficiaries of a judgment obtained by the United States.

In the alternative, if the FDCPA does justify a fee under such circumstances, because it does not provide for an opportunity for the judgment beneficiaries to oppose the award of a fee, it is unconstitutional as a deprivation of property without due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States.

I BY THE ACTION OF THE ATTORNEY GENERAL OF THE UNITED STATES, UTILITIES WERE DENIED THEIR FIFTH AMENDMENT PROCEDURAL DUE PROCESS RIGHT TO OPPOSE THE ATTORNEY GENERAL'S REQUEST FOR FEES FROM FUNDS DUE THE UTILITIES PURSUANT TO AN ORDER OBTAINED BY THE ATTORNEY GENERAL

The Utilities and their fellow Judgment Beneficiaries had a property right to the $800,000 being withheld by the Attorney General by virtue of the

Order of the District Court for the Southern District of Alabama obtained upon the motion of the Attorney General in August 1992. Because that Order entitled them to the first $15.7 million recovered and because they had only received less than $13.4 million, the $800,000 sought by the Attorney General would have been theirs but for the Attorney General's application for the funds.

Fundamental constitutional due process requires that one whose property rights are being taken by the government have the opportunity to challenge such a taking in court.

As this Court explained in Mathews v. Eldridge, 424 U.S. 319, 332-333 (1976):

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment...This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest (citations omitted)...The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552(1965)."

The "property" interest which the Court held in Mathews v. Eldridge was "protected by the Fifth Amendment" was "the interest of an individual in continued receipt of...(Social Security disability) benefits." id

The property interest here, i.e. the interest of the Utilities and their fellow beneficiaries in receiving the $800,000, is certainly as strong as was the property interest in Mathews v. Eldridge; here, the "property interest" was established by an Order sought and obtained by the Attorney General on behalf of the DOE, based upon the DOE's interpretation of its ESA Section 209 statutory obligation to use recovered overcharge funds for "restitution."

In Mathews v. Eldridge, the Court found that the procedure for terminating Social Security benefits satisfied the requirement of constitutional due process because the statutory procedures "assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final." (424 U.S. at 349)

In United States v. James Daniel Good Real Property, 510 U.S. 43, 55-56 (1993), the Court, holding that procedural due process requires prior notice and a hearing before the seizure of property

used to commit or facilitate the commission of a federal drug offense, noted that the "protection (provided by an adversary hearing) is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." In the instant matter, too, the Government has a "direct pecuniary interest;" if the $800,000 is remitted to the DOE, it will be disbursed to the Judgment Beneficiaries, while if it remains in the hands of the Attorney General, it will remain in the U.S. Treasury. See also, Degen v. United States, 517 U.S. 820 (1996), where the Court held that even the failure of a criminal defendant to appear in a related criminal proceeding could not deprive him of the due process right to a hearing before the seizure of property used to facilitate illegal drug sales or purchased with the proceeds of such sales.

And this Court has repeatedly made it clear that judicial review is critically necessary in providing procedural due process. See, e.g., Honda Motor Co. v. Oberg, 512 U.S. 415, 435 (1994) (holding that Oregon's denial of review of the size of punitive damages awards violates the Fourteenth Amendment's Due Process Clause), and United States v. Salerno, 481 U.S. 739, 752 (1987) (upholding pre-trial

detention of a criminal defendant because, inter alia, there is a statutory provision for immediate appellate review of the detention decision.)

Ideally, the due process right to a hearing prior to the diversion of the $800,000 from the Judgment Beneficiaries to the United States would have been provided in the Court in which the Attorney General sought authorization to take the funds, the District Court for the Southern District of Alabama. Such would have been particularly appropriate in light of the fact that the Attorney General sought to accomplish the taking from the Judgment Beneficiaries by an Order to take the funds from her immediate client, the Secretary of Energy, in a proceeding in which the only parties were the Secretary of Energy represented by the Attorney General and the Receiver, interested solely in recovering his own costs and compensation.

The Attorney General failed on her own motion either (i) to suggest to the Secretary of Energy that he be independently represented so that he could oppose the Attorney General's request, or (ii) to notice the Judgment Beneficiaries and name them as the real parties in interest with the right to oppose her proposed taking of their property.

To the contrary, when the Utilities on behalf of themselves and their fellow Judgment Beneficiaries sought to intervene, first to oppose the request for the $185,000 fee sought by the Attorney General, and then to seek reconsideration and/or to appeal the grant of a 10% surcharge pursuant to the FDCPA, the Attorney General opposed intervention. The Attorney General did so first in the District Court which denied intervention, and then in the Court of Appeals for the Eleventh Circuit to which the plaintiffs appealed the denial of intervention.

Admittedly, the plaintiffs were able to set forth their position in the District Court as amici curiae. But they were prevented by virtue of the Attorney General's opposition both to offer oral argument in the District Court and to obtain appellate review of the merits of the District Court's award pursuant to the FDCPA. Such a right to offer oral argument when the Attorney General offered her oral argument and to appeal the District Court decision on the merits would have necessarily followed had the plaintiffs been permitted intervention.

Fortunately, from the point of view of the Judgment Beneficiaries, and in the interest of assuring procedural due process, the Order of the District Court

for the Southern District of Alabama only "awarded" the requested FDCPA compensation to the Attorney General and did not preclude the Attorney General from remitting the amount of the "award" to her client, the Secretary of Energy.

Accordingly, the "award" left open the possibility of an independent action by the Utilities and their fellow Judgment Beneficiaries, seeking to challenge the withholding of the funds by the Attorney General.

The instant mandamus action was undertaken as that independent action, in order to remedy the initial denial of due process and provide the kind of "postponement of the judicial inquiry (which) is not a denial of due process," Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-97 (1930).

II MANDAMUS IS APPROPRIATE, AND NECESSARY, TO REMEDY THE INITIAL DENIAL OF PROCEDURAL DUE PROCESS AND TO REQUIRE THE RETURN OF FEES IN THE HANDS OF THE ATTORNEY GENERAL TO THE EXTENT TO WHICH THEY ARE UNAUTHORIZED BY LAW

If, as will be argued below, there is no basis in the FDCPA for the Attorney General to withhold funds from his immediate client, the DOE, and from his

ultimate clients, the Judgment Beneficiaries, then this is simply a case in which a lawyer is withholding funds improperly from his client. The duty of the Attorney General to remit to his client funds collected for that client is surely "ministerial, plainly defined, peremptory and owed to the plaintiff(s), and ...plaintiff(s) lack an adequate remedy other than mandamus" Public Citizen v. Kantor, 864 F. Supp. 208 (D.D.C. 1994). Accordingly, mandamus properly lies.

In Vishnevsky v. United States, 581 F. 2d 1249, 1253 (7th Cir. 1978), the appellate Court, reversing the District Court, directed that a writ of mandamus be issued to a District Director of Internal Revenue, requiring that a tax over-payment be applied to tax liabilities of the plaintiff for other years, despite the fact that the taxpayers had not filed a timely application for a refund. The Court found that the District Director had informed taxpayers that he would honor the statutory requirement that any overpayment "shall" be refunded. It concluded: "Mandamus surely will lie here, where the very reason the ordinarily adequate remedy of a refund suit is foreclosed is that taxpayers and their counsel believed and relied on the promise of the District Director that their liabilities would be

adjusted by the amount of the overpayment." 581 F. 2d at 1255.

The Vishnevsky Court accordingly found that plaintiffs had met the requirements for mandamus relief, which it explained were "the existence of a clear right in the plaintiff to demand the performance by the defendant of a plainly defined peremptory, and ministerial duty, and the lack of an adequate remedy other than mandamus."id at 1253.

The right of the Judgment Beneficiaries here to the first recoveries, including the $800,000 being retained by the Attorney General, is "clear", having been acknowledged by the Attorney General in seeking the distribution order, the duty to remit to a client funds recovered for the client is a "plainly defined peremptory, and ministerial duty," and the Judgment Beneficiaries have no "adequate remedy other than mandamus."

The Vishnevsky Court was dealing with a situation in many ways similar to that presented here. As it noted, the Internal Revenue Service had the discretion of determining whether there had been an overpayment, but having exercised that discretion by determining that there had been such an overpayment, and its amount, the District Director was required to

honor his own determination. As the Court put it, "Taxpayers, far from attacking the discretionary determination merely seek the benefits thereof." id, at 1254.

Here, the Secretary of Energy, the Attorney General's immediate client, and the Attorney General could conceivably have determined the appropriateness of a fee arrangement and the use of recovered funds to compensate the Attorney General when the Secretary made, and the Attorney General presented to the District Court in Alabama, the recommendation that the first $15,748,700.28 recovered be remitted to the Secretary of Energy for distribution to the Judgment Beneficiaries. The Attorney General's Memorandum in support of the proposed distribution order, submitted to the Court in May, 1992 excepted only certain funds already in the Receiver's hands ($410,000) and "$50,000 to be retained in the (Court) Registry at the time of future transfers (from the Receiver to the Registry), in order to assure that sufficient amounts will remain in the Registry to pay the receiver's future fees and expenses."

The presence of a provision for Receiver's fees and expenses to be paid from recoveries and the remission of the balance for the Judgment Beneficiaries, and the absence of any provision for

Attorney General's fees prior to remission of the $15,748,,700.28, constitutes (in the words of Vishnevsky) a "promise" of the DOE and the Attorney General that there would be no use of recoveries for fees to the Attorney General until the Judgment Beneficiaries received the amount due them under the proposed order.

In the words of Vishnevsky, the plaintiffs and their fellow Judgment Beneficiaries were entitled to have "believed and relied on the promise" of the DOE and the Attorney General that there would be no use of first recoveries for fees to the Attorney General.

For additional appellate decisions finding a basis for the issuance of mandamus to government officials, see Estate of Michael ex rel. Michael v. Lullo, 173 F. 3d 503, 513 (4th Cir. 1999) (another action against a District Director of the Internal Revenue Service, the Court holding mandamus was appropriate to require "government officials and government agencies...to comply with their representations to citizens, such as the representation made the Estate by the IRS in the Closing Letter"; Dietsch v. Schweiker, 700 F. 2d 865 (2nd Cir. 1983) (an action against the Secretary of Health and Human Services, the Court holding mandamus appropriate to require the

Secretary to accept plaintiff's request for review of an adverse decision by an administrative law judge denying Social Security benefits, where the application was filed within the limitation period established by the Secretary's regulations); and Ellis v. Blum, 643 F. 2d 68, 78 (2nd Cir. 1981) (another action against the Secretary of Health and Human Services, this case involving whether a notice of termination of Social Security benefits was sufficient, the Court noting "an impressive array of cases in this and other circuits (that have)...established that (28 U.S.C.) Sec. 1361 jurisdiction will lie to review procedures employed in administering social security benefits (citations omitted)."

The District Court here improperly characterized the request as being for the issuance of a writ of mandamus directed to, and vacating the order of, the Alabama District Court (Appendix, p.17a-18a). The Court of Appeals also erred in the same respect when it characterized the prayer for relief as "a completely inappropriate collateral attack on the Alabama court's judgment." (Appendix, p. 12a).

Utilities do not seek here an order to vacate the District Court authorization to the Attorney General to withhold $800,000 from his clients, although

Utilities would have so sought in the Eleventh Circuit had the Attorney General not opposed their intervention and the matter proceeded to the merits. They merely seek to mandamus the Attorney General not to use the authorization provided by the Alabama District Court, but instead to return the funds to his clients.

Mandamus here is particularly necessary because it is the only means available to remedy the denial of procedural due process at the instance of the Attorney General.

III THE FDCPA DOES NOT AUTHORIZE THE WITHHOLDING BY THE ATTORNEY GENERAL OF A FEE FROM FUNDS DUE THE JUDGMENT BENEFICIARIES

The Attorney General has withheld from his immediate client, the DOE, and from the Judgment Beneficiaries entitled to such funds pursuant to a Court Order (obtained for the DOE by the Attorney General), $800,000, representing 10% of the judgment funds recovered by the Attorney General subsequent to the enactment of the Federal Debt Collection Procedures Act, 28 U.S.C. Section 3011.

The sole basis upon which the Attorney General relies for withholding

the funds is the FDCPA, and specifically the provision of that statute which authorizes "the United States to recover a surcharge of 10 percent of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement under this chapter of the claim for such debt." 28 U.S.C. Sec. 3011 (a).

The Attorney General sought, and obtained, judicial authorization for such withholding of judgment proceeds pursuant to the FDCPA from the District Court for the Southern District of Alabama after that Court denied the Attorney General's fee request of $185,000. The proceeding was one in which the Attorney General represented the DOE, and the only other party was the Receiver who had no interest in the matter other than the collection of his fee and expenses; the Utilities had sought and had been denied intervention.

The FDCPA is a statute which permits the United States to utilize additional procedures to collect a debt due itself, such as (i) garnishment and (ii) adding to the obligation of a debtor to the United States a 10% "surcharge" to recover the costs of collection.

A "surcharge" is an "<u>additional</u> tax, cost, or impost" or "an <u>additional</u> rate

added to the usual charge..." (Webster's Third New International Dictionary, emphasis supplied).

The essence of the authorized "surcharge" is that it be imposed upon the debtor as an addition to the judgment debt.

Here, the withholding by the Attorney General of funds due clients from the partially collected judgment is a "surcharge" not upon the debtor, but upon the Judgment Beneficiaries.

The Court's Final Amended Judgment makes it clear that the amount withheld by the Attorney General is indeed a "surcharge" upon the plaintiffs here and their fellow Judgment Beneficiaries:

The two sentences in the Court's Final Amended Judgment dealing with the award under the FDCPA are as follows:

> "The United States is also awarded, pursuant to 28 U.S.C. Sec. 3011, an amount equal to ten percent of all amounts deposited with the registry of the Court since May, 1991."
>
> "All amounts remaining in the Court Registry after payment of....and the amounts owed the United States pursuant to 28 U.S.C. Sec. 3011, shall be transferred to the Department of Energy in accordance with the Court's previous orders.

(i.e. for distribution by the Department of Energy to the Judgment Beneficiaries.)" (Appendix, p. 37a-38a).

The second sentence makes it clear that the Court has not imposed an additional "surcharge" upon the debtor to be collected after the collection of the entire judgment, i.e. $29,929,116.94 as of April 1, 1992, with continuing interest at 7.71%, but rather has "surcharged" the Judgment Beneficiaries, i.e. has taken funds away from them for the benefit of the Department of Justice. Because the Judgment Beneficiaries were entitled to recover the first $15.7 million recovered, and have received less than $13.4 million, had the $800,000 not been transferred to the Attorney General pursuant to the FDCPA, it would have been transferred to the DOE for disbursement to the Judgment Beneficiaries.

The statute clearly does not contemplate a "surcharge" upon Judgment Beneficiaries.

In effect, what the Court has done is to award the Department of Justice a 10% commission on funds collected for the benefit of the Judgment Beneficiaries. Or, alternatively, it can be viewed as a class action fee imposed upon the Judgment Beneficiaries for services rendered in collecting the funds due them.

The FDCPA authorizes neither. Moreover, if the Court were purporting to be awarding a class action fee, (i) notice would have to be provided the Judgment Beneficiaries, with a right to object, and (ii) in light of the Attorney General's own acknowledgment that her costs in recovery of the debt, including all professional services and overhead, were $185,000, some justification would be properly required for a fee of more than four times as much. No opportunity for the class members to object was provided, and no justification was provided for a fee more than four times the costs of the Attorney General in providing legal and other services in collecting the debt.

Moreover, the Attorney General would be required in any application for a class fee to explain his abandonment of any such prospective claim in proposing to the Alabama District Court in May, 1992, that the first $15,748,700.28 recovered, save the amount necessary "to assure that sufficient funds will remain...to pay the Receiver's future fees and expenses" be transferred to DOE for disbursement to the Judgment Beneficiaries. By making no provision for recovering legal fees or expenses of the Attorney General, the Attorney General acknowledged that such were not properly charged to collected

funds at least until the distribution to the Judgment Beneficiaries of the $15.7 million due them.

The dicta of the D.C. Circuit, i.e. that the FDCPA's language "by no means unambiguously requires...(the) conclusion" that the term 'surcharge' refers to "an amount added to--not subtracted from--the judgment," reflects a shift of the burden of persuasion, from the requirement that the Attorney General prove her statutory entitlement to a fee, to a requirement that those to be charged with the fee prove that the FDCPA cannot be so interpreted. Such a shift of burden was evidently informed by the fact that the issue arises in a mandamus proceeding.

Here, where the mandamus proceeding is being employed by the Judgment Beneficiaries to provide a forum for them to litigate an issue which they were precluded from litigating in the proceeding in which the fee was awarded, the burden is properly imposed upon the Attorney General to prove her statutory entitlement to a fee, not upon the judgment beneficiaries who were to be charged with such a fee.

But regardless of upon whom the burden is placed, no fair reading of the FDCPA provision permitting the "United States...a surcharge of 10% of the amount of the debt" (28 U.S.C. Section 3011)

permits its construction as authorizing a class action fee of 10% to be levied upon the amount received by the beneficiaries of a judgment in favor of the United States.

The word "surcharge" and the fact that it is to be on "the amount of the debt" both argue for a construction that it be an addition to the debt to be levied upon the judgment debtor, necessarily to be paid after the collection of the full judgment.

So too does the context of the provision, i.e. its presence in an act whose purpose it is to provide additional tools to assist the United States in collecting a debt due it. Just as the garnishment process authorized by the FDCPA assists the United States, so too does the right to impose a 10% surcharge upon the debtor; the surcharge provision provides a strong incentive to the judgment debtor to pay the judgment initially, rather then to seek to avoid collection and incur the additional 10%.

As to the D.C. Circuit's observation that appellants "cite(s) no authority, other than Webster's dictionary to support its interpretation," suffice it to note that (i) neither the Court nor the Attorney General cited any authority in support of the use of the surcharge provision to

impose a class action fee, and that (ii) the absence of authority as to such an interpretation merely demonstrates that no previous Attorney General has sought so to misuse the FDCPA.

IV THE READING OF THE "SURCHARGE" PROVISION OF THE FDCPA AS AUTHORIZING A 10% CLASS ACTION FEE TO BE IMPOSED UPON JUDGMENT BENEFICIARIES WHILE BARRING THEM FROM AUTOMATIC PARTY STATUS TO CHALLENGE SUCH A FEE OR ITS AMOUNT WOULD RENDER THE PROVISION UNCONSTITUTIONAL AS SO APPLIED

The FDCPA contemplates litigation in which the United States is plaintiff and a judgment debtor is defendant, so that the party upon whom the surcharge is to be imposed is a party in the proceeding, with the procedural right to challenge the surcharge.

If, instead, the surcharge provision may be employed to assess a class action fee upon judgment beneficiaries who are not parties in the proceeding, it creates a situation in which there is a deprivation of procedural due process to such judgment beneficiaries.

Moreover, the fixing of 10% as the automatic measure of an appropriate class fee is entirely inconsistent with the principle long established by the Supreme

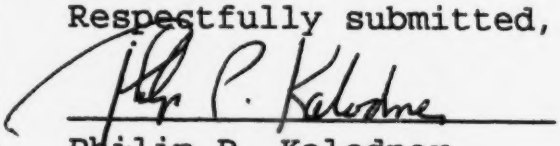
Court and the D.C. Circuit that the amount of a common fund fee is to be fixed by the Court after careful consideration of the value of services rendered by the attorney to the class. Boeing Co. v. Van Gemert, 444 U.S. 472 (1979), Bebchick v. Washington Metro Area Transit, 805 F. 2d 396 (D.C. Cir, 1986).

Accordingly, application of the 10% surcharge provision to charge non-parties with a common fund fee without regard to the services rendered constitutes an unconstitutional denial of due process.

CONCLUSION

For the reasons above stated, a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 15, 2002 Decided April 23, 2002

No. 01-5107

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC., ET AL.,
APPELLANTS

V.

JOHN D. ASHCROFT
ATTORNEY GENERAL OF THE UNITED STATES AND
RUTH A. HARVEY, ATTORNEY, CIVIL DIVISION,
DEPARTMENT OF STATE,
APPELLEES

Appeal from the United States District Court
For the District of Columbia
(No. 00cv01962)

Philip Kalodner argued the cause and filed the briefs for appellant.

Bruce G. Forrest, Attorney, U.S. Department of Justice, argued the cause for the appellees. With him on the

brief were *Roscoe C. Howard, Jr.*, U.S. Attorney, and *William Kanter,* Deputy Director, U.S. Department of Justice.

Before: SENTELLE, HENDERSON and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Following decades of oil overcharge litigation under the Economic Stabilization Act of 1970, the United States Attorney General recovered a multi-million dollar judgment on behalf of thirty-seven utilities, including the three appellants. Awarded by the United States District Court for the Southern District of Alabama, that judgment included an $800,000 surcharge payable to the Attorney General pursuant to the Federal Debt Collection Procedures Act. Appellants then filed suit in the United States District Court for the District of Columbia seeking a writ of mandamus that would direct the Attorney General to pay the $800,000 to them. Concluding that Appellants failed to show that the Attorney General's retention of the surcharge amounted to a violation of a clear ministerial duty that would warrant mandamus, the district court denied the writ. We agree.

I.

The now-defunct Economic Stabilization Act of 1970 (ESA), as amended, 12 U.S.C.§ 1904 note, gave the President broad authority to "issue such orders and regulations as he may deem appropriate to stabilize prices." Pub. L. 91-279, § 202, 84 Stat. 799, 799 (1970) (expired 1974). Acting pursuant to delegated ESA authority, *see id.* § 203, 84 Stat. At 800, the Secretary of Energy created price controls for crude oil. Under the ESA, the Attorney General (as well as private parties) has authority to seek restitution for any "sale of goods or services exceed[ing] the applicable ceiling under regulations or orders issued under this title." Economic Stabilization Act Amendments of 1971, Pub. L. 91-379, §§ 209-10, 85 Stat. 743, 748 (1971).

In 1977, the Attorney General intervened in litigation pending in the United States District Court of the Southern District of Alabama to obtain ESA restitution on behalf of thirty-seven utilities that had purchased crude oil at prices exceeding Department of Energy limits. Among the thirty-seven utilities were the three appellants: Consolidated Edison, Long Island Lighting Company, and Niagara Mohawk Power Corporation, to whom we will refer collectively throughout this opinion as "Edison." Eleven years of litigation later, the Alabama district court awarded a judgment of approximately $30 million in the Attorney General's favor. Following another decade of litigation caused by the sellers' efforts to escape payment, the court entered a final judgment of $15.75 million. Pursuant to court

order, the funds were deposited into a Department of Energy escrow account for distribution to the thirty-seven judgment beneficiaries on a pro rata basis.

Central to this case, the Alabama judgment included an $800,000 surcharge payable to the Attorney General pursuant to the Federal Debt Collection Procedures Act. That Act provides that the U.S. government "is entitled to recover a 10% surcharge of the amount of the recovered debt in connection with recovery of the debt." 28 U.S.C. 3011(a).

After the Alabama district court denied Edison's motion to intervene to challenge the surcharge, Edison filed suit in the United States District Court for the District of Columbia seeking a writ of mandamus that would direct the Attorney General to remit the $800,000 surcharge to the Department of Energy for transmission to the judgment beneficiaries. According to Edison, nothing in the Debt Collection Act authorized the surcharge. Finding that "the decision of the Justice Department to pursue recovery of a surcharge ... is not a ministerial act[,] ... and it clearly is not so free from doubt that the Government didn't have the authority and the discretion to seek to invoke [the Debt Collection Act]," Tr. Mots. Hr'g of 1/30/01 at 6, the district court dismissed the complaint. Edison filed simultaneous appeals in this court and the United States Court of Appeals for the Federal Circuit, and successfully moved to stay the latter appeal pending the resolution of this one.

II.

Before addressing the mandamus issue, we must consider the Attorney General's arguments that jurisdiction lies exclusively in the Federal Circuit and that, in any event, Edison lacks Article III standing. We consider each argument in turn.

The Attorney General's first argument rests on ESA section 211, which placed exclusive jurisdiction over "cases or controversies arising under" that statute in a specialized federal court, the Temporary Emergency Court of Appeals. Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, § 211(a), 85 Stat. 743, 748 (1971). That court has since been dissolved and its jurisdiction transferred to the Federal Circuit. *See* Federal Courts Administration Act of 1992, Pub. L. 102-572, § 102(a), 106 Stat. 4506, 4506 (1992) (abolishing the Temporary Emergency Court of Appeals); *id.* at § 102(b), 106 Stat. at 4506 (codified as amended at 28 U.S.C. § 1295(a)(11) (establishing exclusive Federal Circuit jurisdiction over ESA issues). The Federal Circuit construes its ESA jurisdiction narrowly. In *Texas American Oil Co. v. United States Department of Energy*, the Federal Circuit held that it possesses only "'issue' jurisdiction, not 'case' or 'arising under' jurisdiction" over ESA issues, emphasizing that such a holding "steadfastly implements[s] the jurisdictional policy and practice of deciding only the ESA issues in a case, leaving to the regional circuit courts all other issues arising in the same

transaction or joined to [the] ESA issues." 44 F.3d 1557, 1563 (Fed. Cir. 1995). In other words, the Federal Circuit will only "decide certain questions that do not aris[e] independently of the substantive [ESA] claim or cause of action and have no life apart from that substantive claim." *Stertz v. Gulf Oil Corp.*, 783 F.2d 1064, 1069 (Temp. Emer. Ct. App. 1986) (alterations in original) (internal quotation marks and citations omitted). The Federal Circuit uses a two-part test for determining whether an issue falls within its exclusive ESA jurisdiction. First, resolution of the litigation must required application or interpretation of the ESA or regulations issued thereunder; and second, the ESA issue must have been adjudicated in the district court. *Tex. Am.*, 44 F.3d at 1563.

The issue raised here fails the first element of the *Texas American* test. Although the litigation leading to this appeal has its origins in the ESA, the substantive question under that statute—whether Edison was entitled to restitution for alleged oil overcharges—was long ago resolved by the Alabama district court. Moreover, the issue Edison now raises—whether the Debt Collection Act authorizes the Attorney General's $800,000 surcharge—requires neither interpretation nor application of the ESA. Asked at oral argument to identify any ESA issues we must decide to resolve this appeal, the Attorney General's counsel candidly conceded there are none. Because the Debt Collection Act question has "life apart" from the substantive ESA cause of

action that gave rise to this litigation decades ago, we have jurisdiction to consider it.

This result comports with decisions of both the Supreme Court and one of our sister circuits holding that issues relating to enforcement of an ESA judgment fall outside the Federal Circuit's exclusive jurisdiction if they require neither interpretation nor application of the ESA. In *Bray v. United States*, the Supreme Court held that the Temporary Emergency Court of Appeals' exclusive jurisdiction did not encompass an appeal of a contempt proceeding growing out of a party's refusal to produce documents subpoenaed in connection with a possible ESA violation. 423 U.S. 73, 73-74 (1975). "Although the contempt charge related to an order entered in connection with an investigation of [ESA] violations," the Court explained, "it was not dependent on the existence of such violations," and thus sufficiently separate from the substantive ESA issues that the Tenth Circuit should have exercised jurisdiction. *Id.* At 75-76. Similarly, in *Citronell-Mobile Gathering Inc. v. Watkins*, the Eleventh Circuit reviewed a challenge to a district court's appointment of a receiver whose sole purpose was to enforce an ESA judgment. 934 F.2d 1180, 1184-85 (1991). The court pointed out that because "appellants' liability for ESA ... violations has already been fully litigated, ... [t]here remains no question of liability based on those ... violations." *Id.* At 1185. It went on to hold that because "the issues on this

appeal concern the post-judgment enforcement of the ... decision," the challenge to the appointment was not integrally related to the ESA, thus not within the Federal Circuit's exclusive jurisdiction. *Id.* Here too, determining whether the Attorney General may retain the Debt Collection Act surcharge does not require that we review—or even question—the Alabama district court's conclusion that the ESA entitles Edison to restitution for the oil overcharges.

Insisting that this case nevertheless belongs in the Federal Circuit, the Attorney General claims that the district court here considered "an important issue requiring the interpretation of the ... ESA," namely, whether "plaintiffs failed to state a claim under the Economic Stabilization Act." Appellee's Br. at 17, 18. It is true that the district court ruled that because "there is not private right of action under the Economic Stabilization Act Amendments of 1971[,] ... there is no standing," and therefore extensively considered the ESA's provisions for public and private rights of action as well as related Federal Circuit decisions. Tr. Mots. Hr'g of 1/30/01 at 6, 6-11. The district court's ESA discussion, however, has no effect on our jurisdiction. As the Federal Circuit has repeatedly emphasized, its ESA jurisdiction is issue-specific, and the issue we must resolve in this appeal does not require in that Edison state a cause of action under the ESA. Instead, because Edison sought a writ of mandamus, whether it stated a cause of action depends on the All Writs Act, which authorizes federal courts to "issue all

writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651.

Next, the Attorney General contends that Edison seeks to "split" its appeal, and that the company intends to follow up any adverse result on the merits by briefing the same issues again in its pending appeal in the Federal Circuit. Appellee's Br. at 18-19. A bifurcated appeals process, however, seems precisely what the Federal Circuit's issue-based approach contemplates: "[A]ny issue requiring interpretation or applications of the ... ESA [ ] or related regulations has been held to be within the exclusive purview of the [Federal Circuit], and separated from the appeal of any other substantive issue." *Tex. Am.*, 44 F.3d at 1563. In any event, no duplicative merits determinations could occur, for if we have jurisdiction over the Debt Collection Act issue, that issue would necessarily fall outside the Federal Circuit's exclusive ESA jurisdiction.

Finally, the Attorney General cites *Texas American* for the proposition that "[w]hen the [Federal Circuit] has taken jurisdiction [of ESA issues], the court has occasionally been required to consider and apply laws in interaction with the ESA." *Id.* at 1564. But that proposition—where an issue requires interpretation of both the ESA and another statute, the Federal Circuit can exercise jurisdiction over the non-ESA issue—sheds no light on which questions *this* circuit may entertain. Besides, because the Debt Collection Act

issue does not require interpretation of the ESA, *see supra* at 5, no such "interaction" could take place.

As to Edison's standing, the Attorney General does not articulate his claim in terms of the familiar constitutional standard: a "concrete and particularized" "injury-in-fact" that is "fairly ... trace[able]" to the conduct of the defendant and may be "redressed" by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations in original). Instead, he argues, the relief Edison seeks requires "this court [to] attribute a desire on the part of the Department of Energy to obtain, via judicial fiat, an order running against federal officials from one Executive Branch agency to another." Appellee's Br. at 20. We assume that the Attorney General means that Edison's claim is not redressable—that is, requiring him to remit the surcharge to the Energy Department would fail to redress Edison's claimed injury because it would fail to place the $800,000 in the judgment beneficiaries' corporate hands. This claim, however, ignores the Alabama district court's express requirement that "[w]henever ... the amount held by DOE in escrow for this case ... exceeds $1,000,000, but in any event no less often than once every two years, DOE shall make further *pro rata* payments to the claimants." Order of the United States District Court of the Southern District for Alabama at 2, *Citronelle-Mobile Gathering, Inc. v. Watkins* (May 14, 1992) (No. Civ. 77-101-A). Thus, had the district court here issued the writ and directed the Attorney General

to deposit $800,000 in the Department of Energy escrow account, the Alabama district court's order would have required Energy to disburse those funds directly to Edison. Accordingly, the presence of the Department of Energy as intermediary between Edison and the Attorney General does not deprive Edison of standing.

III.

"[A] 'drastic' remedy, 'to be invoked only in extraordinary situations,'" *In re Papandreou*, 139 F.3d 247, 249 (D.C. Cir. 1998) (quoting *Kerr v. U.S. Dist. Court*, 426, U.S. 394, 402 (1976)), mandamus is inappropriate except where a public official has violated a "ministerial" duty. Such a duty must be "so plainly prescribed as to be free from doubt and equivalent to a positive command ... . [W]here the duty is not thus plainly prescribed but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur v. United States*, 281 U.S. 206, 218-19 (1929).

We agree with the district court that Edison's showing falls far short of this high standard. To begin with, the Attorney General obtained the surcharge and now retains it pursuant to a federal court order. He is this complying with—not violating—his legal obligations. Resisting this obvious proposition, Edison argues that the Attorney

General's possession of the surcharge is so plainly wrong that it amounts to a violation of a ministerial duty. In our view, however, this argument amounts to a completely inappropriate collateral attack on the Alabama court's judgment. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1946) (holding that mandamus is only available to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so"). Although Edison never formally asked the district court here to mandamus the Alabama district court, the relief it seeks amounts to exactly the same thing, for however phrased, Edison's complaint challenges the Alabama district court's interpretation of the Debt Collection Act.

Even if we were free to consider Edison's arguments, they would provide no basis for mandamus. Edison first claims that "this is simply a case in which a lawyer is withholding funds improperly from his client," Appellants' Opening Br. at 32, thus violating a duty that is "ministerial, plainly defined, peremptory, and owed to the plaintiff," *id.* (quoting *Public Citizen v. Kantor*, 864 F. Supp. 208, 212 (D.D.C. 1994)). The cases Edison cites, though, all involve attorneys refusing to pay funds courts had awarded to clients. Here, by contrast, the Alabama district court ordered the $800,000 paid to the Attorney General. *See* Order of the United States District Court for the Southern District of

Alabama at 2, *Citronelle-Mobile Gathering, Inc. v. Peña* (Sept. 23, 1997) (No. Civ. 77-101-A).

Equally without merit is Edison's argument that the Debt Collection Act so plainly does not authorize the surcharge that the Attorney General wrongly possesses the $800,000 and should therefore be required to remit it to the judgment beneficiaries. According to Edison, the "essence of the authorized 'surcharge' is that it be imposed on the debtor as an *addition* to the judgment debt," and "the withholding by the Attorney General of funds due clients from the partially collected judgment is a 'surcharge' not upon the debtor, but upon the Judgment Beneficiaries." Appellants' Opening Br. at 24. We agree with the district court that this argument is "somewhat of a stretch." Tr. Mots. Hr'g of 1/30/01 at 14. While the term "surcharge" might refer to an amount added on to—not subtracted from—the judgment, the Debt Collection Act's language by no means unambiguously requires this conclusion, and Edison cites no authority, other than *Webster's Dictionary*, to support its interpretation. The dictionary, however, provides no basis for concluding that the Attorney General of the United States violated a duty "so plainly prescribed as to be free from doubt and equivalent to a positive command."

The district court's dismissal of the complaint is affirmed.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED EDISON, ET AL,	.	Docket No. CA 00-1962
Plaintiffs,	.	Washington, D.C.
	.	January 30, 2001
vs.	.	9:05 a.m.
JANET RENO, ET AL,	.	
Defendants	.	

. . . . . .

(RULING)

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES;

For the Plaintiffs:	PHILIP P. KALODNER, ESQUIRE
For the Defendants:	BRENDAN COLLINS, ESQUIRE
Official Court Reporter:	SANTA THERESA ZIZZO Room 4800C U.S. Courthouse Washington, DC 20001 (202) 289-1160

PROCEEDINGS

(EXCERPT)

THE COURT: All right. Let me do this, as I said before, I read the papers before the argument and I read many of the cases you've cited, and while I'm sure I could be more articulate about it if I wrote something but I can be faster about it if I just announced my decision, and either of both of you can order a transcript from Miss Zizzo for purposes of the next step in this matter.

As I understand the essential undisputed facts, in 1998 the Government obtained a judgment in the Southern District of Alabama against Citronelle-Mobile Gathering, Inc. and others, and the corporate defendants and the individual involved in that case were charged with violating regulations of the Department of Energy with regard to the pricing of crude oil during the Arab embargo in the mid-seventies. And the original amount I think was said to be this morning about 6.7 million dollars but as of April, 1992 with interest it was over $29,000,000 and higher today. The amount collected was about 15.75 million dollars.

It went to the Department of Energy for distribution to 37 purchasers of Citronelle Oil Products that had purchased refined oil products affected by the overcharges. The District Court ordered that the 15.75 million be distributed to the 37 oil purchasers pro rata by the Department of Energy. But the Government asked under the

– under 28 USC Section 3011, which is part of the Federal Debt Collection Act that a surcharge of ten percent of the amount be provided to the Government for its costs of handling the enforcement action. So about 13.4 million of the 15.75 million was – went to the Department of Energy and distributed to the 37 purchasers and 800,000 went to the Department of Justice pursuant to 28 USC 3011 and under the Order of the United States District Court in Alabama. And that is reflected in the final amended judgment of the Court of Alabama of September 26, 1997 which has a line which says, "That the United States is also awarded, pursuant to 28 U.S. Section 3011, an amount equal to ten percent of all amounts deposited with the Registry of the Court since May, 1991." That lawsuit was brought by three of the 37 purchasers who benefited from the judgment in the Citronelle case.

There are a number of arguments that were made that have been fully briefed and that I heard this morning. The plaintiffs are seeking that the $800,000 be returned by the Department of Justice or the U.S. Treasury to the Department of Energy so that it can be distributed to these plaintiffs and the other 34 oil purchasers, presumably on the same pro rata basis.

The lawsuit brought by the three plaintiffs, Consolidated Edison Company of New York, Long Island Lighting Company and Niagara Mohawk Power Corporation in this courthouse is brought against Janet Reno as Attorney

General of the United States and Ruth A. Harvey, Attorney for the Civil Division in the Department of Justice. While this issue was not briefed and only alluded to in the briefs, I think it's clear that Miss Harvey is an inappropriate defendant in this case. She's not being sued in her original capacity. She's not being sued for constitutional violations. She's being sued in her official capacity for actions taken as an attorney in the Civil Division in connection with the litigation in Alabama. And the Court will order that she be dismissed as a defendant in this case because she's not a proper party under any scenario.

The defendant, Janet Reno, although technically today it probably should be Eric Holder as Acting Attorney General of the United States, perhaps next week someone else, but the defendant, the named defendant is Janet Reno, Attorney General of the United States, also sued in her official capacity, represented here by the Department of Justice makes several arguments.

The first argument is that this is, in effect, a motion for request of mandamus and an Order to the – effectively an Order to the United States District Court for the Southern District of Alabama and possibly a mandamus of the Attorney General, depending upon how you read the plaintiffs' complaint.

Well, the plaintiffs suggest that they're not really seeking mandamus against the United States District Court in Alabama, and maybe they're retreating from that position.

Certainly the briefs that have been filed in this case indicate that that is in effect at least in part what they're asking and they used the word vacate the District Court's decision.

The law is clear first that mandamus is an extraordinary remedy and only available for claims clear and certain and when the duty of the Government office or agency involved is ministerial and plainly defined. It's even clearer, I suppose, that one District Court cannot issue a writ of mandamus to another District Court.

Some of the cases have talked about the attempt to get such mandamus as a horizontal appeal and the Supreme Court as long ago as 1943 indicated that was inappropriate in Roche versus Evaporated Milk Association, 319 U.S. 21. And it's even clearer in a Ninth Circuit case, Mullis versus U.S. Bankruptcy Court for the District of Nevada, 828 Fed. 2d, 1385, and that Court said, "The District Court lacks authority to issue a writ of mandamus to another District Court because to do so would permit, in effect, horizontal appeal from one District Court to another." It cannot do that. It cannot vacate the Order of another District Court.

The Government argues that once I reach that conclusion, which I now have reached, that I can't mandamus the Justice Department either because – for two reasons. First, the Justice Department is acting pursuant to a lawful order of a United States District Court Judge for in this case the Southern District of Alabama, and for me to issue a writ of mandamus to the Department of Justice to

return the money would be ordering them to violate a Court Order. I think there is merit to that argument.

Beyond that, to the extent that plaintiffs are seeking relief with respect to the Attorney General, seeking mandamus, the Government argues, and I agree, that the criteria for the mandamus are not met. The decision of the Justice Department to pursue recovery of a surcharge under the Federal Debt Collection Procedures Act is not a ministerial act. It involved a lot of discretion and judgment and it clearly is not so free from doubt that the Government didn't have the authority and the discretion to seek to invoke that Act before a Federal Court that I could issue a writ of mandamus against the Attorney General for her exercise of judgment and her exercise of discretion to take a particular litigation position with respect to the surcharge under 28 USS 3011. So I don't think I have jurisdiction to issue a mandamus in this case.

The second set of arguments presented by the Government I also agree with, and that is that there is no private right of action under the Economic Stabilization Act Amendments of 1971. And therefore there is no standing, in effect, under any of the provisions that are invoked by the plaintiffs in this case.

Section 209 of the Act authorizes a person authorized by the President to ask the Attorney General to bring an action to enjoin the kinds of acts that were at issue before the District Judge in Alabama. I think it's pretty clear from the

language of 209 that a private individual does not have authority itself to bring enforcement actions of the kind set forth in 209 to seek an injunction. That is a statute which provides authority to the Attorney General to bring an action. The – Judge Harold Greene of this Court so ruled in Consolidated Edison Company versus O'Leary and he was affirmed in what we've often referred to as Con Ed I versus O'Leary, 117 Fed 3d, 538, a Federal Circuit decision in 1997 in which the Federal Circuit held that plaintiffs, these same plaintiffs some of them, have no private right of action under the Economic Stabilization Act Section 209 by which they can show they were entitled to the Department of Energy's distribution of overcharges covered under 209.

I don't think it's necessary for me to reach the Government's collateral estoppel argument, saying that the plaintiffs cannot attempt to persuade me anew about the 209 argument, particularly in light of arguably the subsequent cases from the Federal Circuit that may have an impact on the Act, but certainly the Government is free to rely on Judge Greene's opinion and the affirmance of it in Cod Ed I and I think for reasons I'll talk about in a minute or two, that the reasoning in Cod Ed I still holds.

To the extent that the plaintiffs seek to rely on Section 210 of the Economic Stabilization Act, that Section has been held to apply to actions by private persons against other private persons. And that is what the second court – I'm sorry, the second Con Ed I decision concluded. It said that

Section has limited claims against other private persons. The Government cannot bring such actions, cannot bring actions under 210, nor can the Government be subject to 218. Section 210 is a private Attorney General provision that permits an individual to sue a violator of the Act if the Government declines to do so, but it doesn't give these plaintiffs standing to sue the government.

So that leaves 211. The language of 211 gives the District Court exclusive jurisdiction of cases or controversies arising under this Title or Regulations or Orders issued under that statute, but in Con Ed I the Federal Circuit said that 211 essentially confers jurisdiction in cases that are essentially APA type cases. 211 (d) (1) – all of 211 relates to causes of action brought under that statute or under Regulations or Orders issued under that statute and 211 (d) and (e) make it clear that what's involved essentially is Orders or Regulations of an agency of the Government that are issued in excess of the agency's authority or are arbitrary and capricious and or otherwise unlawful or as to which there's no substantial evidence to support them. And (d) (1) and (e) (1) of Section 211 cite the Administrative Procedures Act and rely upon the Administrative Procedures Act. So these really provide causes of action to proceed under the Administrative Procedures Act in this context.

The plaintiffs argue that if that's what Con Ed I said, that Con Ed IV, the most recent decision of the Federal Circuit, decided in November, Consolidated Edison

Company versus Richardson, 233 Fed. 3d, 1376, overruled, rejected, modified Con Ed I. I don't really think that's true. And I note that Judge Plager was on the panel in all four of the Con Ed decisions issued by the Federal Circuit and actually wrote three of the four of them, including the most recent.

The crucial language from Con Ed IV it seems to meddoes not permit stretching Section 211 as far as plaintiffs try to. In that case the Federal Circuit found that a third-party beneficiary had a right to challenge the Department of Energy's actions but only, it seems to me from closely reading Con Ed IV, was because the issue was whether the Department of Energy had followed its own regulations and procedures when awarding a specific refund amount to a particular claimant. It seems that the Federal Circuit in Con Ed IV was recognizing what amounts to a right to seek APA review under Section 211 of the Act but nothing more than that.

They made a distinction between discretionary matters of broad public policy and questions of whether the agency followed its own procedures, its own Orders, its own Regulations in a case that did not implicate particular broad policy considerations that are peculiarly within the province of the agency. Judge Plager for the Court said, "Indeed, reviewing whether an agency has followed its own procedures, and whether the evidence supports a particular result reached by the agency, are exactly the sort of issues

that Courts routinely review in this type of proceeding." That sentence paraphrases both the Administrative procedures Act and Sections (d) and (e) of Section 211. The Court did not overrule Con Ed I, II, or III on Con Ed IV and – at least as I read Con Ed IV, and I think plaintiff asks me to stretch that holding too far. Obviously if I'm wrong as to what the Federal Circuit did or intended to do in Con Ed IV, Con Ed V will tell us.

As I said before, I'm not going to agree with the Government on its collateral estoppel argument with respect toe Judge Greene's decision because it seems to me that there's been enough water under the bridge since that decision in Con Ed I, that that would not be fair at this point.

The next question is sovereign immunity, and the Government I think sets out the standards and the plaintiff doesn't really disagree with the standards as to waivers of sovereign immunity. Congress must unequivocally express its intent to waive sovereign immunity for a Court to find that is has done so. The Government argues that there's no express or explicit waiver of sovereign immunity in the Economic Stabilization Act. The plaintiffs disagree. They think that there is an express waiver. Or if not, the Court should deem sovereign immunity to be waived because of the nature of the case and the fact that the money at issue really isn't the Government's money but really is the plaintiff's money, and so it's not like suing the Government for compensatory damages or something.

With respect to the first argument, a review of the text of the relevant sections of the Economic Stabilization Act makes pretty clear, makes quite clear that there is not express waiver of sovereign immunity. Section 209, it seems to me, is clearly restricted to granting authority to the United States, as I said before, to bring suits to enjoin certain acts or practices. It does not permit suit to be brought against the United States. Section 218 permits individuals to bring suits against other individuals under the act in lieu of the Government bringing suit. It does not give those individuals the right to bring suit against the United States. So either neither 209 nor 218 is an explicit waiver of sovereign immunity with respect to suing the Government.

And with respect to 211, it seems to me that there is no waiver of sovereign immunity with respect to money or return of money for damages but rather at the most a right to sue the Government to make sure that it meets its obligations, not be act arbitrarily and capriciously or contrary to law in issuing Regulations and Orders.

With respect to plaintiffs' second argument that even if sovereign immunity hasn't been waived the Court should deem it waived because the $800,000 at issue does not belong to the sovereign and therefore the sovereign doesn't have a right to assert sovereign immunity, it seems to me that in Con Id III, 108 Fed. 3d, 1395, the Federal Circuit effectively considered and rejected the argument that sovereign immunity does not apply when the money sought

would otherwise not have inured to the benefit of the Government, as the Government says on a number of places, but in particular I'm looking at pages nine and ten of the reply brief, and the Government also cites VGS Corporation versus Department of Energy, 808 Fed. 2d 842, a 1986 decision of the Temporary Emergency Court of Appeals which was the Court that dealt with such matters before the Federal Circuit was created.

With respect to res judicata, I'm inclined to agree with the plaintiff that res judicata does not apply in this case, a claim for res judicata, because the plaintiffs were not permitted to intervene. True, they participated as amicus and they were able to express their views on all aspects of the case, including the $800,000, but one of the benefits and detriments of intervention is that you become a party and you're bound by the decisions. You can be held in contempt, for example. You can be enjoined, for example. Damages, can be awarded against you if you intervene as a defendant. But if you're an amicus you have none of the potential benefits and none of the potential detriments and your role is limited. The Court can consider or not consider an amicus brief. The Court probably doesn't consider it with as much weight as it considers an intervenor's brief. I don't think it does. And you're deprived of the right to appeal. And I think it's stretching a claim for inclusion of res judicata to say that because the Court of Appeals denied the request to intervene or affirmed the decision of the District Court not to

permit intervention it considered the plaintiffs' position on the merits for res judicata purposes, and there's a lot of deference given by Courts of Appeals to District Court Judges who deny motions to intervene. So I don't agree with the res judicata argument of the plaintiffs.

Obviously when Mr. Kalodner appeals my decision to the Federal Circuit the Federal Circuit will consider the grant of the motion to dismiss de novo and if the Government wants to suggest alternative grounds for affirming me besides the fact that I ruled in their favor, I think the law permits them to do so.

With respect to the plaintiffs' substantive arguments which the Government deals with both in response – both in its motion for dismissal to a certain extent but also on its on position to the plaintiffs' motion for summary judgment, the plaintiff argues that the Government has misused and misread the Federal Debt Collection Procedures Act because the statute simply doesn't apply in this case for a number of reasons. One, it doesn't apply until essentially the Government has recovered because this is a surcharge, an additional charge, maybe if the Government collected the full $31,000,000 then it might be entitled to the $800,000, and for a number of other reasons. And because the Federal Debt Collection Procedures Act does not apply where the United States is seeking to collect an amount due in restitution to a third party rather than an amount due as part of a debt directly to the Government.

It seems to me first that the United States District Court Judge in Alabama decided these questions explicitly or implicitly and heard and considered the arguments.

Second, that with respect to the surcharge argument that the plaintiffs make, I just think that the plaintiffs' argument is something of a stretch. The Government I think argues correctly that the surcharge is in fact the surcharge on the defendant in the Alabama litigation, not on the defendants in this case.

And with respect to the second argument there is admittedly a split in the Circuits, with the Second Circuit finding that the Federal Debt Collection Procedures Act is applicable in situations like this, and the First Circuit reaching the opposite result.

To the extent I need to or it will be useful for me to do so in connection with the non-plaintiff's motion or I suppose if I dismiss the case it's implicit that I deny the motion for summary judgment of the plaintiff, it seems to me that this case was closer in its facts to the Second Circuit's opinion in NLRB versus EDP Medical Computer Systems 6 Fed. 3d 951, Second Circuit, 1993, than it is to the First Circuit's decision in United States versus Bongiorno, B-O-N-G-I-O-R-N-O, 106 Fed. 3d 1027. Iin the Government's argument in its reply brief I guess from pages 13 to 20 and particularly its discussion of those cases at 13 through 18, I find those arguments persuasive.

And so for all of these reasons I will grant the motion to dismiss Miss Harvey as a defendant, I will grant the motion of the United States to dismiss the Attorney General as a defendant and to dismiss this case in its entirety on its merits and I will deny the motion to grant summary judgment for the plaintiffs.

Is there anything anybody else thinks I need to say or do in order to complete the record for purposes of appeal? I'll just issue an Order which says for the reasons stated in open Court there will be a final judgment.

MR. KALODNER: I don't think it's necessary, sir.

THE COURT: Thank you, Mr. Kalodner.

MR. KALODNER: No, Your Honor, thank you.

THE COURT: Thank you all.

(Proceedings concluded at 11:05 a.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcription from the record of proceedings in the above-mentioned matter.

S/Santa Zizzo
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.,	)	Filed Jan. 31, 2001
Plaintiffs,	)	
v.	)	Civil Action No. 98-0764 (RWR)
CHEVRON U.S.A., INC.,	)	
Defendant.	)	

ORDER OF DISMISSAL

On January 30, 2001, the Court heard argument on defendants' motion to dismiss and plaintiffs' motion for summary judgment. The Court also considered defendants' oral motion to dismiss defendant Ruth A. Harvey. Upon consideration of the arguments made by counsel at the motions hearing and the briefs filed by the parties, and for the reasons stated in open court, it is hereby

ORDERED that defendants' oral motion to dismiss defendant Ruth A. Harvey is GRANTED. Ms. Harvey is not a proper defendant in this lawsuit and should never have been named. She is dismissed from this case; it is

FURTHER ORDERED that defendants' motion to dismiss [3-1] is GRANTED; it is

FURTHER ORDERED that plaintiffs' motion for summary judgment [6-1] is DENIED; and it is

FURTHER ORDERED that this case is DISMISSED with prejudice and the Clerk of the Court shall remove it from the docket of this Court. This is a final appealable order. See Rule 4(a), Fed. R. App. P.

SO ORDERED

S/Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 1/31/01

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CITRONELLE-MOBILE GATHERING, INC., et al	:	CIVIL ACTION
	:	
Plaintiffs and Counterclaim Defendants,	:	
	:	
FREDRICO PENA,	:	
Defendant, and	:	
UNITED STATES OF AMERICA,	:	
Counterclaimant.	:	NO. CV77-101-A

ORDER

Currently before the Court is the fourth joint motion to intervene filed by Consolidated Edison Company of New York, Niagara Mohawk Power Corporation, and Long Island Lighting Company ("Judgment Beneficiaries"). Also before the Court is the Judgment Beneficiaries' alternative motion to participate in this case as amicus curiae. For the following reasons, the Judgment Beneficiaries' motion to intervene will

be **DENIED**, and their motion to participate as amicus curiae will be **GRANTED**.

DISCUSSION

The facts leading to the current motion are complicated and span a period of over seventeen years. As such, the Court will not outline all of the facts leading to the current motion to intervene, but rather will outline only those facts necessary to resolve the pending motions.

The Judgment Beneficiaries filed three previous motions to intervene in this action in November, 1995, July, 1996, and January, 1997. All these motions to intervene were denied by the Court and all three denials were appealed by the Judgment Beneficiaries. The three appeals were consolidated by the Eleventh Circuit ("consolidated appeals"). On June 30, 1997, after hearing oral argument on the consolidated appeals, the Eleventh Circuit affirmed all three of the Court's denials of the motions to intervene filed by the Judgment Beneficiaries. See Citronelle-Mobile Gathering, Inc. v. Pena, Nos. 96-6194, 96-6977, 97-6251 (11th Cir. June 30, 1997) (per curium) (Unpublished Order affirming the district court).

After thoroughly reviewing the briefs filed by the Judgment Beneficiaries, in addition to the briefs filed by the United States opposing the fourth motion to intervene, the Court finds that all of the issues raised by the Judgment Beneficiaries in the current motion were raised previously

and were resolved against them by the Eleventh Court. Thus, the issues raised in the fourth motion to intervene are barred by the doctrine of res judicata. Accordingly, the Court will deny the fourth motion to intervene in this case.[1]

However, the Court will grant the Judgment Beneficiaries' motion to participate in this matter as amicus curiae. Although the Government contends that the Judgment Beneficiaries have not justified their request to participate as amicus curiae and that additional participation in this matter will unnecessarily increase the costs to the parties, the Court disagrees with those contentions. The Court has determined on several occasions that the Judgment Beneficiaries do not have an interest in this matter sufficient to permit intervention under Rule 24 of the Federal Rules of Civil Procedure and the Court reaffirms its prior holdings on that issue. However, allowing the Judgment Beneficiaries to

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[1] In denying this fourth motion to intervene, the Court is mindful of the rule established in Stallworth v. Monsanto Co., 558 F.2 257 (5th Cir. 1977), which requires that a district court explicitly rule on the four different factors governing motions to intervene as of right when it denies a motion to intervene. See Maddow v. Proctor & Gamble Co., 107 F.3d 846, 854 (11th Cir. 1997) (reaffirming the rule in Stallworth).

However, outlining the four prong test, as well as stating the reasons why the Judgment Beneficiaries fail to satisfy that test, would be redundant and is unnecessary at this late stage in this case. The Court already has satisfied the Stallworth rule and incorporates its prior reasoning for denying the three previously filed motions to intervene. The Court also agrees with the arguments raised by counsel for the United States on the issue of intervention and incorporates by reference those arguments in this Order.

participate as amicus curiae does not afford them status as an interested party in this matter and neither will it increase costs unnecessarily nor delay final resolution of this case. The added participation by the Judgment Beneficiaries will serve to enlighten the Court on the issues involved in this case and, presumably, offer a different perspective on those considerations before the Court in this ongoing litigation.

By allowing the Judgment Beneficiaries to participate in this matter as amicus curiae, the Judgment Beneficiaries are allowed to file a brief with the Court outlining their positions on the issues involved. The Judgment Beneficiaries are not allowed to participate in or to conduct any discovery in this case. They simply may express formally their views to the Court in writing, which simply furthers the general jurisprudential notions supporting any grant of amicus curiae status to a non-party.[2]

CONCLUSION

The Court has read and considered all briefs filed in this matter on the issues involved. For the foregoing reasons, the Judgment Beneficiaries' fourth motion to intervene in this

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[2] Those afforded amicus curiae status are merely friends of the Court who are granted permission to file a brief on a given matter suggesting a rationale consistent with their own views. See generally Black's Law Dictionary 75 (5th ed. 1979). Amicus curiae are not parties in an action and simply serve to benefit the Court's reasoning on one or more issues involved in a case.

case is **DENIED**. The Judgment Beneficiaries' alternative motion to participate as amicus curiae in this matter is **GRANTED** in accordance with the terms of this Order. Accordingly, the Judgment Beneficiaries have ten (10) days from the date of this Order to file their amicus curiae brief with the Court.

SO ORDERED, this 9th day of July, 1997.

S/Anthony A. Alaimo
JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CITRONELLE-MOBILE GATHERING, INC., et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
FREDERICO PENA, et al.,	:	
Defendants	:	
and	:	
UNITED STATES OF AMERICA,	:	
Counterclaimant.	:	NO. 77-101-A

FINAL AMENDED JUDGMENT

This action came before the Court. The issues have been considered and a decision has been rendered. The Court has further considered the United States' Motion for Reconsideration of Order Denying Reimbursement of Attorneys' Fees and Motion for Payment of Fees Pursuant to September 18, 1990 Order or, in the Alternative, For

Payment of a Surcharge Pursuant to 28 U.S.C. § 3011(a) and Motion to Correct Clerical Error.

IT IS ORDERED AND ADJUDGED that, in accordance with the Court's order, dated August 1, 1997, terminating receivership and discharging receiver, granting in part and denying in part the Receiver's final report and accounting and request for fees and expenses, granting in part and denying in part the Government's motion for payment of costs and attorneys' fees.

Judgment is hereby entered terminating receivership and discharging Gary J. Knostman as Receiver and granting the Receiver a total of $181,304.90 in personal fees and expenses as the total balance due him for his efforts in serving as Receiver. The Receiver is ordered to pay the fees and costs for all professional services rendered as indicated in the text of the Court's order.

Judgment is entered awarding the Government its costs in the amount of $21,948.18, with interest at the rate of 7.71 percent per annum, commencing on the date such costs were paid by the Government. The United States is also awarded, pursuant to 28 U.S.C. § 3011, an amount equal to ten percent of all amounts deposited with the Registry of the Court since May, 1991.

All amount remaining in the Court Registry after payment of the Receiver's fees and expenses, the costs awarded the United States, and the amounts owed the United States pursuant to 28 U.S.C. § 3011, shall be transferred to

the Department of Energy in accordance with the Court's previous orders.

SO ORDERED, this 23rd day of September, 1997.

S/Anthony A. Alaimo
JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SITTING BY DESIGNATION

Judgement Entered on Docket 9/26/97
Judgement Entry No. 6247
Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CITRONELLE-MOBILE GATHERING, INC., et al.,	:	CIVIL ACTION
Plaintiffs and Counterclaim Defendants	:	
v.	:	
FREDRICO PENA, et al.,	:	
Defendant	:	
and	:	
UNITED STATES OF AMERICA,	:	
Counterclaimant.	:	NO. 77-101-A

ORDER

Upon consideration of the fifth motion of Consolidated Edison Company of New York, Niagara Mohawk Power Corporation, and Long Island Lighting Company (collectively the "Intervenors") to intervene in this case, and the response of the Government thereto, said motion to intervene is hereby **DENIED.**

SO ORDERED, this 13th day of November, 1997.

S/Anthony A. Alaimo
JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[DO NOT PUBLISH]

Filed Dec 16, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6728
Non-Argument Calendar

D.C. Docket No. 77-101-A

CITRONELLE-MOBILE
GATHERING, INC., et al

Plaintiffs, Counterclaimants-
Defendants

versus

FEDERICO PENA,

Defendant,

UNITED STATES
OF AMERICA,

Defendant-Counterclaimant-
Appellee,

CONSOLIDATED EDISON
COMPANY OF NEW YORK,
NIAGARA MOHAWK POWER
CORPORATION, et al.,

Movants-Appellants

Appeals from the United States District Court
for the Southern District of Alabama

(December 16, 1998)

Before HATCHETT, Chief Judge, COX and CARNES, Circuit Judges.

PER CURIAM:

Appellants Consolidated Edison Company of New York, Inc., Long Island Lighting Company and Niagara Mohawk Corporation (collectively, the appellants) challenge the district court's denial of two motions for intervention. We hold that the law of the case controls and affirm the district court's decision.

The history of this case is long and complicated; this circuit and the Temporary Emergency Court of Appeals have

issued numerous opinions dealing with the parties in this case.* The central issue underlying this litigation was whether certain sales of crude oil made during the Arab oil embargo between December 1973 and April 1974 were subject to price controls under section 209 of the Economic Stabilization Act of 1970.

For purposes of this appeal, the appellants initially moved for intervention three times – November 1995, July 1996 and January 1997. The district court denied their motions each time. This court consolidated the appeals from the denials of their motions and affirmed without discussion. See 11th Cir. R. 36-1; Citronelle-Mobile Gathering, Inc. v. Pena, Nos. 96-6194, 96-6977 and 97-6251 (11th Cir. June 30, 1997) (unpublished). The appellants again moved to intervene, or in the alternative, to proceed as amicus curiae in June 1997 and moved to intervene again in October 1997. The district court, relying on its previous rulings and this courts' per curiam opinion, denied both motions to intervene, but allowed the appellants to proceed as amicus curiae.

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* See Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297 (11th Circ. 1991); Citronelle-Mobile Gathering, Inc. v. Watkins, 934 F.2d 1180 (11th Cir. 1991); Citronelle-Mobile Gathering v. Herrington, 826 F.2d 16 (Temp. Emer. Ct. App.), cert. denied, 484 U.S. 943 (1987); Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717 (Temp. Emerg. Ct. App.), cert. denied, 459 U.S. 877 (1982); Citronelle-Mobile Gathering, Inc. v. O'Leary, 499 F. Supp. 871 (S.D. Ala. 1980), aff'd 669 F.2d 717 (Temp. Emer. Ct. App. 1982), cert. denied, 459 U.S. 877 (1982).

Under the law of the case doctrine, "an appellate court's decision of a legal issue must be followed in all subsequent trials or intermediate appellate proceedings in the same case." Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1003 (11th Cir. 1997) (citations omitted). The doctrine "promotes finality, assures the obedience of the district court to appellate decisions, and avoids waste of judicial resources." Venn v. St. Paul Fire & Marine Ins. Co., 99 F.3d 1058, 1063 (11th Cir. 1996). Additionally, "binding precedent makes clear that the law of the case encompasses all things 'decided by necessary implication as well as those decided explicitly.'" Burger King Corp. v. Pilgrim's Pride Corp., 15 F.3d 166, 169 (11th Cir. 1994) (quoting Wheeler v. City of Pleasant Grove, 746 F. 2d 1437, 1440 (11th Cir. 1984)). This circuit has acknowledged that the law of the case doctrine applies equally to unpublished decisions. See In re United States, 60 F.3d 729, 731 n.2 (11th Cir. 1995) ("While that [unpublished] holding may be law of the case insofar as this panel is concerned ... its holding ... is not law of this circuit and will not be binding on any future panel in a case involving a different defendant."), cert. denied, 515 U.S. 1099 (1996).

We will not apply the law of the case doctrine "when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest

injustice." Wheeler, 746 F. 2d at 1440. We hold that this court's unpublished per curiam opinion "decided by necessary implication" the issue of intervention and is thus the law of the case. Additionally, we hold that the appellants have not demonstrated that any exception to the law of the case doctrine is applicable here. Accordingly, we affirm the district court's denial of the appellants' motions for intervention.

AFFIRMED.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5107 **September Term, 2001**
00cv01962

Filed On: June 21, 2002

Consolidated Edison Company of
New York, Inc., et al,

Appellants

v.

John D. Ashcroft, Attorney General
of the United States and Ruth A.
Harvey, Attorney, Civil Division,
Department of State,
Appellees

BEFORE: Sentelle, Henderson and Tatel, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed June 5, 2002, it is **ORDERD** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5107 **September Term, 2001**
00cv01962

Filed On: June 21, 2002

Consolidated Edison Company of
New York, Inc., et al,

Appellants

v.

John D. Ashcroft, Attorney General
of the United States and Ruth A.
Harvey, Attorney, Civil Division,
Department of State,

Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatal, and Garland,* Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERD that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

* Circuit Judge Garland did not participate in this matter.